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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2010-CP-10-9158

APPELLATE CASE No.: 2015-000111

Johnson Koola,.....Appellant,

v.

Cambridge Two, LLC, Albert V. Estee, Individually, Cambridge Lakes, LP, Stephen R. Heape, Individually and as General Partner of Cambridge Lakes LP, Cambridge Lakes Apartment Homes, a/k/a Cambridge Lakes Apartments, LP, a/k/a Cambridge Lakes Apartment Homes, LP, Classic Properties of Charleston, Inc., Cambridge Contracting, LP, Trademark Properties, Inc., Carolina One Charleston Home Team Properties, LLC, Charleston Home Team, LLC, Carolina One, and William E. Jenkinson, IV, individually,

Of Whom Trademark Properties, Inc., and Carolina One Real Estate are theRespondents.

APPELLANT'S REPLY BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR BECAUSE IT GRANTED SUMMARY JUDGMENT TO TRADEMARK WITHOUT ADJUDICATING ON QUESTIONS OF LAW RELATED TO JOINT TORTFEASORS?
- II. DID THE TRIAL COURT ERR IN RULING THAT TRADEMARK CANNOT BE LIABLE TO KOOLA FOR SCHPA VIOLATION AS A JOINT TORTFEASOR?
- III. DID THE TRIAL COURT ERR WHEN THE COURT RULED THAT TRADEMARK IS NOT LEGALLY OBLIGATED TO CONVEY SCHPA MANDATED DISCLOSURE REPORT TO KOOLA DESPITE THE LEGISLATIVE MANDATE OF SCHPA AND DUTIES OF REAL ESTATE LICENSEES AND BROKERS?
- IV. DID THE TRIAL COURT ERR IN DISMISSING TRADEMARK'S VIOLATION OF SCUPTA BECAUSE THE COURT RULED THAT TRADEMARK IS NOT LIABLE FOR FAILURE TO MAKE SCHPA MANDATED DISCLOSURES?
- V. DID THE TRIAL COURT ERR IN DENYING TRADEMARK'S LIABILITY TO KOOLA FOR NEGLIGENCE AND BREACH OF CONTRACT AND/OR WARRANTY BASED UPON THE LACK OF PRIVITY BETWEEN KOOLA AND TRADEMARK?
- VI. DID THE TRIAL COURT ERR IN RULING THAT TRADEMARK CANNOT BE LIABLE TO KOOLA FOR FRAUD?

In response to respondent Trademark Properties, Inc.'s ("Trademark") Initial Brief, appellant pro se, Johnson Koola ("Koola" or appellant), files and serves appellant's Reply Brief. Respondent Carolina One Real estate ("Carolina One") has failed to file and serve its Initial Brief.

ADDENDUM TO STATEMENT OF FACTS

Statement of facts presented in Trademark's Initial Brief fails to address the following critical points related to its sale of a Cambridge Lakes condominium (the

"Condominium") to Koola. (Trademark, Initial Brief, pp. 4-5). Koola details the material facts related to Trademark as Addendum to Statement of Facts.

(i) On August 9, 2012, Albert Estée and Cambridge Two, LLC, (collectively 'developer(s)/seller(s)') hired Trademark as an exclusive sales agent for converting the Cambridge Lakes apartments (the "Apartments") into Condominiums in compliance with SCHA and marketing the converted Condominiums to public. (R. # 8). On February 24, 2003, they established Cambridge Lakes Horizontal Property Regime and recorded the Master Deed. (R. # 9)

(ii) Albert Estee stated in an affidavit filed with the Court that the developers/sellers hired Trademark: (i) To convert all the Apartments into Condominiums and to market them; and (ii) To convey statutorily required Disclosure information, including S. C. Code Ann. § 27-31-430- mandated Disclosure report, (the "HPA § 27-31-430-mandated Disclosure report") to prospective purchasers of the Condominiums. (R. # 10).

(v) Trademark assumed the following duties (Duty of Care): (i) To convert the Apartments to Condominiums in compliance with SCHA; and (ii) To convey statutorily required Disclosure information, including HPA § 27-31-430-mandated Disclosure report to Condominiums buyers. (R. # 10, # 11, # 12, # 13).

(vi) The developers/sellers sent a letter entitled "Notice of Condominium Conversion and Offer to Purchase" to the tenants in possession of the Apartments which stated that they will be provided with a copy of the HPA § 27-31-430-mandated Disclosure report before they buy the units. (R. # 15) The tenants were advised to contact Trademark for assistance in making the offer and to buy the condominiums. (R. # 15). Thereby, *Developer/sellers delegated the duty of care to*

provide the HPA § 27-31-430-mandated Disclosure report to prospective buyers to Trademark. This also confirms that Trademark had actual and constructive knowledge about its duty to convey HPA § 27-31-430-mandated Disclosure report to prospective buyers.

(v) Trademark assumed the following specific duty of care to sell a Condominium to Koola: (i) Converted the Apartment into Condominium which appellant bought subsequently; this marked the beginning of the assumption of Duty of Care by Trademark to Koola; (ii) Negotiated listing agreement and priced appellant's unit at \$126,900; (iii) On April 17, 2003, effected a price change to an average price of \$134,500 on appellant's unit as well as all other unsold units; and (iv) Received Tax Map Number for appellant's Unit. (R. # 12, # 13, # 14).

(vi) In May/June 2003, the developer/seller terminated the Listing agreement with Trademark stating that it did not provide statutorily required Disclosure information, including HPA § 27-31-430-mandated Disclosure report to Condominiums buyers (R. # 10, # 11, # 12, and # 13). Trademark's failure to challenge its termination of the listing agreement is a *per se* admission that it had an oral contract/agreement with developer/seller or a legal duty to provide HPA § 27-31-430-mandated Disclosure report to Condominium buyers.

(viii) On May 28, 2003, Richard David, Managing Director of Trademark, wrote a letter to the developers/sellers, which stated: "Trademark Properties was hired for the sole purpose of converting your existing Apartment community....into a viable condominium sales project.... You hired us for our expertise to convert your apartment community.... [W]e successfully converted into Condominiums, which can be identified by the issuance of tax map number. You hired us for our expertise to

convert your apartment community.... If Trademark Properties is not paid in full by July 15th 2003, we will file a lawsuit ..." (R. # 12).

(ix) Trademark did not file the lawsuit against developer/seller. Trademark realized that it had an oral, contractual duty to provide HPA § 27-31-430-mandated Disclosure report to Condominiums buyers upon conversion. (R. # 10, # 11).

(x) During the period August 2012 to June 2003, Trademark pre-sold/sold nearly thirty (30) units to Condominium buyers. Trademark did not provide HPA § 27-31-430-mandated Disclosure report to any of the Condominium buyers

(xi) There is no need for this Court to determine whether Trademark converted all the Apartments to Condominiums or not. It is an undisputed Statement of Fact stated by developer/seller and admitted by Trademark. (R. # 10, # 11, # 12, # 13).

(xii) Immediately after the termination of Trademark's Listing Agreement, developers/sellers hired Carolina One as the exclusive agent to complete the marketing of the condominiums. Carolina One sold a condominium to Koola and nearly fifty (50) other buyers and did not provide statutorily required HPA § 27-31-430-mandated Disclosure report to anyone including Koola in violation of SCHPA.

(xiii) Conversion of the Apartments into Condominiums by Trademark without full compliance with SCHPA and sale of the converted Condominiums by Trademark to public without providing the statutorily required Disclosure information, including HPA § 27-31-430-mandated Disclosure report are the initial torts that Trademark committed. Carolina One, which followed Trademark, completed the marketing of the rest of the Condominiums in violation of SCHPA and did not provide HPA § 27-31-430-mandated Disclosure report to Koola and other buyers. Carolina One and Trademark are joint tortfeasors.

ARGUMENTS

I. THE TRIAL COURT GRANTED SUMMARY JUDGMENT TO TRADEMARK WITHOUT ADJUDICATING ON QUESTIONS OF LAW RELATED TO JOINT TORTFEASORS.

During the hearing on Motion for Summary Judgment on October 22, 2014, (R. # 23, TR. pp. 10-15) and through “Memorandum of Law and Points of Authorities in Opposition to Trademark’s Motion for Summary Judgment”, Koola represented to the Court that it was his theory that Trademark is liable to Koola as a joint tortfeasor with other co-defendants for violation of SCHPA, even though Trademark did not sell the Condominium to Koola. (R. # 5, R. # 23). Trademark did not address appellant’s claim that it is a joint tortfeasor with other co-defendants. (R. # 23, TR. pp 4-9). Instead of adjudicating on the issue of joint tortfeasor after hearing both parties, the Trial Judge argued and advocated on behalf of Trademark and ruled that Trademark is not a joint tortfeasor thereby causing prejudice to appellant. (R. #1, # 23, TR. pp. 10-15)

The Trial Judge told Koola that he would not accept any argument that Trademark could be a joint tortfeasor by stating that “*you [Koola] don’t have any evidence in any of the filings or submissions that makes Trademark a tortfeasor[s] in the condominium conversion. Sorry*”. (R. # 23, TR. p. 13). Appellant tried to reply that he has explained in the “Memorandum of Law and Points of Authorities in Opposition to Trademark’s Motion for Summary Judgment”, why Trademark is a joint tortfeasor. **The Trial Judge would not allow appellant to speak and again told: “Sorry, it’s not there”**. To avoid Contempt of the Court, appellant did not raise the joint tortfeasor issue again. However, appellant attempted to provide a basis for the finding that Trademark is a joint tortfeasor based on authorities from

previous Supreme Court decisions. (This reply Brief, *infra*, pp. 8-9). However, the Trial Judge refused to hear Koola's position and advised Koola that the Trial Judge's Ruling from the Bench on joint tortfeasor stands, and Koola could appeal the Trial Judge's decision and get his Decision reversed. (R. # 5, R. #23, TR. 13-14). The Trial Judge did not hear Koola's other alleged claims against Trademark and granted Trademark's Motion for Summary Judgment.

The Trial Judge asked Trademark to prepare an Order based on what it submitted to the Court on the day of Motion hearing. The Trial Judge further advised Trademark "there is no need to muddy the water" [because] Trademark wasn't a party to the transaction. (TR. p. 15). Thus, the November 3, 2014 Order of the Trial Judge does not even mention that appellant raised and argued the issue that Trademark is a joint tortfeasor. (R. # 1). The Order does not make any reference to Koola's other arguments raised in the court filings. In its Initial Brief, Trademark states that the Trial Court correctly concluded that Koola has no viable cause of action against Trademark because it was not involved in the sale of a Condominium to Koola. (Trademark, Initial Brief). The Trial Judge came to this conclusion simply because he would not consider Koola's argument that Trademark is a joint tortfeasor. The Trial Judge's November 3, 2014 Order is at best read as an *amicus curiae* brief or an advocacy report on behalf of Trademark.

The Trial Judge did not apply precedents related to "joint tortfeasor" while issuing his Order. (R. # 3). "The Supreme Court may want to grant certiorari in the instant case and modify or overrule its previous decision, but this court [Court of Appeals] has no authority to change it". *American Fast Print Ltd., v. Design Prints of Hickory*, 288 S.C. 46, 339 S.E.2d 516 (Ct.App 1986). In effect, the Trial judge

overruled Appellate Courts' decisions and precedents and promulgated Trial Court's own "rules governing practice and procedure" with respect to the application of joint tortfeasor to Koola's claims. A circuit court may not promulgate its own "...rules governing practice and procedure...", and "the promulgation of rules by the respective circuits is inconsistent with the constitutional mandate, Article V, section 4 of the South Carolina Constitution, and is unconstitutional and void." *State v. Duncan, Jr.*, 274 S.C. 379, 264 S.E.2d 421 (1980). Modifications or limitations of Supreme Court's decisions [on joint tortfeasors as here] are a violation of S.C. CONST. art. V, § 9. *Daniels v. City of Goose Creek*, 314 S.C. 494, 431 S.E.2d 256 (Ct.App. 1993).

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity, and impartiality of the judiciary. Canon 2. (A), CJC, Rule 501, SCACR. Further, a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. Canon 3 B(7), Rule 501, SCACR. The Trial Judge did not hear all of Koola's representations during motion hearing and denied Koola Due Process of Law of the U.S. Constitution. The Trial Judge's refusal to hear Koola's arguments in support of joint tortfeasors, and that Koola could appeal the Trial Judge's decision and get his Decision reversed created two classes of citizens; one class can seek relief in the Circuit Court, and another class has to go to the Appellate Court for review. The Trial Court effectively denied Koola Equal Protection Law of the U.S. Constitution. Koola prays to this Court to review the Trial Court's ruling from the Bench.

II. THE TRIAL COURT ERRONEOUSLY RULED THAT TRADEMARK COULDN'T BE LIABLE TO KOOLA FOR SCHPA VIOLATION AS A JOINT TORTFEASOR.

To support his argument that Trademark is a joint tortfeasor with other co-defendants, Appellant cites to the following Supreme Court decisions:

"A tortfeasor may be subjected to tort liability for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of Privity between the tortfeasor and the third party such liability exists independently of contract, and rests upon the tortfeasor's duty to exercise due care." (Internal citations omitted.)

Kennedy vs. Columbia Lumber and Manufacturing Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989):

"A tortfeasor may be subjected to tort liability for injury to a third party arising out of the tortfeasor's contractual relationship with another despite the absence of Privity between the tortfeasor and the third party; such liability exists independently of contract, and rests upon the tortfeasor's duty to exercise due care....The duty may be derived from the tortfeasor's contractual relationship with another."

Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986);

"Parties that have no legal relation to one and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them."

Scott by McCure v. Fruehauf, 302 S. C. 364, 396 S.E.2d 354 (1990):

"South Carolina is in the vanguard in permitting a plaintiff to recover economic loss from a seller with whom he did not deal and who made no express warranties to him.... It would be patently unfair to allow a manufacturer of a defective product to escape liability via privity when the plaintiff is an individual, so it is unfair to disallow recovery when a corporation brings suit." (Internal citations omitted.)

JKT Company, Inc. v. Hardwick, 274 S.C. 413, 265 S.E.2d 519 (1980):

"Recently we overruled a privity objection and allowed a suit by a subsequent purchaser of a warehouse against a manufacturer of materials used in its construction. In so ruling, we indicated the concept of privity is no longer viable in this jurisdiction." (Internal citations omitted.)

Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980):

In its Initial Brief, Respondent makes out following arguments, and appellant responds to them:

(i) **Joint Tortfeasors are two or more persons whose tortuous conduct is a legal cause of single and indivisible harm to the injured party.” (Restatement (Second) of Torts § 875 (1979). (Trademark, Initial Brief, pp 13-14).**

The tort committed by the defendants named in the case at bar cannot practically be divided and is a joint tort and they are all are joint tortfeasors. (This Reply Brief, Appellant’s Initial Brief, R. # 5).

(ii) **Appellant failed to explain what tortuous conduct Trademark committed to cause harm to appellant. (Trademark, Initial Brief, pp. 13-14).**

Trademark assumed the following specific Duty of Care to sell a Condominium to Koola: (i) Converted the Apartment into Condominium which appellant bought subsequently; (ii) Negotiated listing agreement and priced appellant’s unit at \$126,900. (iii) Effected a price change on April 17, 2003 to realize an average price of \$134,500 on appellant’s unit; and (iv) Received Tax Map Number for appellant’s Unit. (This Reply Brief, supra, p. 3, R. # 12, # 14).

Conversion of the Apartments into Condominiums by Trademark without full compliance with SCHPA and sale of the converted Condominiums by Trademark to public without providing HPA § 27-31-430-mandated Disclosure report are the initial torts that Trademark committed. Carolina One perpetuated the tort initiated by Trademark in the sale of the converted Condominiums, because of its failure to provide HPA § 27-31-430-mandated Disclosure report to Koola and other buyers. Thereby their torts became a joint tort and they are joint tortfeasors. To determine tort liability, “[t]he key inquiry is foreseeability, not privity”. *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770.

(iii) The Supreme Court decisions cited by appellant have no clear connection to appellant's allegation that Trademark is a joint tortfeasor with other parties that were involved in the sale transaction, out of which appellant's alleged damages arose. (Trademark, Initial Reply, p. 13)).

Trademark's argument is without merit. The application of *Kennedy vs. Columbia Lumber and Manufacturing Co., Inc., supra, Barker v. Sauls, supra, Scott by McCure v. Fruehauf, supra, JKT Company, Inc. v. Hardwick, supra*, establishes that a joint tortfeasor [*whether a real estate broker/licensee/agent such as Trademark, or a homebuilder or a product manufacturer with strict liability etc.*] who has no contractual duty to a third party [*whether a purchaser of converted condominium such as Koola, a second-time home buyer, a corporation etc.*] can be liable to the third party from his duty to exercise due care and from his contractual obligations to the other tortfeasor despite the lack of privity. This Court could review these case laws and come to its own independent conclusion.

Whether Trademark and Carolina One are joint tortfeasors is a mixed question of law and fact, which was improper to decide on Summary Judgment. It is respectfully submitted that this Court undertakes a de novo review of all issues of law and of facts presented in the Record to render its Decision on merit.

III. BECAUSE THE TRIAL COURT DID NOT CONSIDER THE LEGISLATIVE INTENT OF SCHPA AND FAILED TO APPREHEND THE DUTIES OF REAL ESTATE BROKERS/LICENSEES/AGENTS, THE TRIAL COURT ERRONEOUSLY RULED THAT TRADEMARK IS NOT LIABLE TO KOOLA FOR VIOLATION OF SCHPA.

In the Trial Court, Koola argued that Trademark and Carolina One are mandated to provide S.C. Code Ann. § 27-31-430-mandated Disclosure Report to prospective buyers because: (i) Trademark and Carolina One were employed as agents for developers/sellers; and (ii) The Listing agreement stipulated that

developer/seller shall not deal directly with buyers of Condominiums. (R. # 5, # 6, # 8, # 23, TR, pp. 22- 23),

S.C. Code Ann. § 27-31-430 mandates: (i) Preparation of the Disclosure of the Physical Condition of the Buildings report in compliance with S.C. Code Ann. § 27-31-430; and (ii) Timely delivery of the said Disclosure Report to prospective purchases. When the developer/seller himself sells the converted Condominiums, he assumes both of these responsibilities. Under S.C. Code Ann. § 40-57-137(F), however, a seller's agent is not obligated to discover latent defects in property. Preparation of the S.C. Code Ann. § 27-31-430-mandated Disclosure Report is the sole responsibility of the developer/seller under these circumstances. When the agent sells the converted Condominiums on behalf of the developer/seller, the timely delivery of the HPA § 27-31-430-mandated Disclosure report to prospective buyers falls on the Agent. The agent stands in the shoes of the seller/principal. (R. # 23, TR. p. 17). The developer/seller(principal) has conveyed his express, implied and apparent authority to the agent to act on his behalf. (R. # 5, # 6).

Trademark did not address the issue of the mandate of S.C. Code Ann. § 27-31-430 during the hearing on Motion for Summary Judgment. Carolina One argued that the seller has to deliver the HPA § 27-31-430-mandated Disclosure report to the prospective buyer **under all circumstances**, and not the Agent. Without interpreting the mandate of the HPA § 27-31-430 at all, the Trial Judge granted Summary Judgment to Trademark and Carolina One. "An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law...." *Wieters v. Bon-Secours-St. Francis*, 378 S.C. 160, 662 S.E.2d 430, 434-436 (Ct.App. 2008).

A plain reading of the S.C. Code Ann. § 27-31-430 reveals the following facts: (i) The buyer of the converted condominium has no responsibility to discover any latent defects; (ii) The developer/seller has to provide the HPA § 27-31-430-mandated Disclosure report to all prospective buyers when the developer/seller himself sells the converted condominiums; (iii) The legislature did not spell out who has the duty to deliver the HPA § 27-31-430-mandated Disclosure report to buyers when the developer/seller employs an exclusive real estate broker/agent to sell the converted condominiums, because the legislature is well aware of the time honored South Carolina Codes and case laws dealing with the duties of developers/sellers and real estate brokers/licensees/agents.

Koola has cited in sufficient detail to the relevant South Carolina Codes regarding the mandate of S.C. Code Ann. § 27-31-430 the in the Court filings. (R. # 5, # 6) These are briefly summarized here.

Duties of the owner/developer/seller: *Initially*, the owner of the real property shall furnish to a purchaser a written disclosure statement to a buyer of general real estate or converted condominiums. S.C. Code Ann. §27-50-40(A); S.C. Code Ann. § 27-31-430.

Duties of Real Estate Licensees: When the owner of the real property **employs** a real estate licensee/broker/agent, he delegates the duty to convey the statutorily required Disclosure information, including HPA § 27-31-430-mandated Disclosure report to buyers to real estate licensee/broker/agent. S.C. Code Ann. §§ 27-50-40(C), 70(A) and S.C. Code Ann. §§ 40-50-137(A), (B)(2), (F), (K).

Protection of buyers of converted condominiums is the legislative intent of S.C. Code Ann. § 27-31-430. The Legislature also intended that the real

estate licensee/broker/agent must convey or deliver the HPA § 27-31-430-mandated Disclosure report to prospective buyers when the developer/seller employs an agent to market converted condominiums; this intent is conveyed through S.C. Code Ann. §§ 27-50-40(C), 70(A) and S.C. Code Ann. §§ 40-50-137(A), (B)(2), (F), (K).

Fiduciary Duty: Because of the Buyer Representation Agreement (R. # 16) and the Dual Agency Agreement (R. # 17) signed between Koola and Carolina One, there is a Principal (Koola) and Agent (Carolina One) relationship between the parties, and Carolina One owed fiduciary duty to Koola. S.C. Code Ann. 40-57-30(A), 137(A), 137(M)(1). Koola argues further that Trademark is liable to Koola for breach of fiduciary duty since it assumed the following specific duty of care to sell a Condominium to Koola: (i) Converted the Apartment into Condominium which Koola bought subsequently; (ii) Negotiated listing agreement and priced Koola's unit at \$126,900. (iii) Effected a price change on April 17, 2003 to realize an average price of \$134,500 on Koola's unit; (iv) Received Tax Map Number for Koola's Unit; and (v) Trademark is a joint tortfeasor with other defendants. (R. # 12, # 13, # 14). Koola cites to *Peoples Fed. S & L v. Myrtle Beach Golf*, 310 S.C. 132, 425 S.E.2d 764 (Ct.App. 1992). Restatement (Second) of Torts § 874: Violation of Fiduciary Duty (1979) and Comment (b) thereto in support of his arguments.

Trademark and Carolina One committed fraud when they breached Fiduciary Duty owed to Koola. Trademark has not responded to Koola's argument that it has committed fraud due to violation of fiduciary duty.

Duties of Principal and Agent: An Agent is endowed with Express, Implied and Apparent Authority from the Principal to perform certain acts on behalf of the Principal to the third parties. Restatement (second) of Agency § 1 (1958); *Roberson*

v. Southern Finance of South Carolina, Inc., 365 S.C. 6, 615 S.E.2d 112 (2005).
Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996).

The Agent, as well as, the principal in a sale has a duty not to make only truthful statements of fact. The doctrine that an agent is not liable for contracts made on behalf of a disclosed principal does not apply when the agent must answer, not in contract, but in tort. *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005), *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). *Thomas v. Delta Enterprises, Inc.*, 302 S.C. 351, 396 S.E.2d 122 (Ct.App. 1990). *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957). *Gilbert v. Mid-South Machinery Co., Inc.*, 267 S.C. 211, 227 S.E.2d 189 (1976).

In *State of South Carolina v. C&L Corp. Inc.*, 280 S.C. 519, 313 S.E.2d 334, the Appellate Court affirmed the lower court's decision that the developer and its agent are liable for misrepresentations made by salesman during negotiation for sale of lots, regardless of their knowledge as to those representations and confirmed civil penalty under Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (SCUPTA). The Trial Court failed to apprehend the duty of care created due to fiduciary duty and duties of principal (Koola) and agent Trademark and/or Carolina One); the Trial Court erred when it ruled that Trademark and Carolina One are not legally obligated to convey/provide S.C. Code Ann. § 27-31-430-mandated Disclosure Report to Koola. (R. # 1, # 2).

Law of the Case, or alternatively Collateral Estoppel (R. # 5, 27-28):
Trademark's Motion for Summary Judgment filed against the HOA states, *inter alia*:
(i) Trademark has no duty to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure report to any Cambridge Lakes condominium buyers; and (ii) the HOA is

not a prospective purchaser of the condominium under S.C. Code Ann. § 27-13-430. The Trial Judge denied Trademark's Motion, and his ruling in the said case was the Law of the Case. The Motion for Summary Judgment filed by Trademark against the HOA in the HOA's 2008 lawsuit is identical to Motion for Summary Judgment filed by Trademark against Koola in Koola's case at bar. Both involved the same questions of law: Liabilities of Trademark in the sale of a converted condominium to a buyer with whom Trademark had no contractual or privity relationship. The *pro se* appellant contends that the Law of the Case in the HOA's 2008 lawsuit is applicable to Koola's case at bar either as a Law of the Case or, alternatively as the Doctrine of Collateral Estoppel. (R. # 5, pp. 27-28). This contention is more relevant because there are no appellate court decisions interpreting S.C. Code Ann. § 27-31-430. Moreover, privity requirements are not a valid defense in South Carolina. (This Reply Brief, *supra*, pp. 8-9).

Trademark argues that Law of the Case in HOA's 2008 Lawsuit is not applicable to Koola's case (Trademark, Initial Brief, pp. 14-14); this Court may review arguments of both parties and render a decision.

Trial Judge in HOA's lawsuit **denied** Trademark's argument that Trademark has no duty to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure report to Condominium buyers. Trial Judge In Koola's lawsuit **granted** Trademark's argument that Trademark has no duty to provide the S.C. Code Ann. § 27-31-430-mandated Disclosure Report to Koola. (R. # 5, 27-28). In effect, the Trial Judge in Koola's lawsuit overruled the Trial Judge in the HOA's lawsuit in the same circuit on the same subject matter jurisdiction in the same Circuit. "***This State has a long***

standing rule that one judge of the same court cannot overrule another.

Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778 (S.C. 2013).

It is respectfully submitted that this Court undertakes a review of the facts presented in the Record and of the laws and renders its own Decision on merit on Koola's claims that Trademark violated SCHPA and more specifically, S.C. Code Ann. § 27-31-430.

IV. BECAUSE THE TRIAL COURT RULED THAT RESPONDENTS ARE NOT LIABLE FOR FAILURE TO MAKE THE DISCLOSURE AS MANDATED BY SCHPA, THE TRIAL COURT ERRED IN DISMISSING TRADEMARK'S VIOLATION OF SCUPTA.

Koola argues that Trademark is liable to Koola for violation of SCUPTA on two counts for: (i) Violation of S.C. Code § 27-31-430 specifically and (ii) Unfair Trade Practices in general.

A failure to make the disclosure statement under S.C. Code § 27-31-430 automatically constitutes a violation of the S.C. Unfair Trade Practices Act, which is the **legislative mandate** of S.C. Code § 27-31-430. For this reason, Trademark is automatically liable to Koola for violation of SCUTPA, because it violated SCHPA.

Trademark is liable to Koola for unfair trade practices under SCUTPA generally, because: (i) Respondents made misrepresentation to Koola while selling a converted Condominium to Koola; (ii) Respondents' action affected all the Cambridge Lakes Condominium buyers, which total about two hundred buyers and nearly thirty percentage of the Condominium buyers lost their homes to foreclosures and short sales; and (iii) Potential for repetition. In *State of South Carolina v. C&L Corp. Inc.*, 280 S.C. 519, 313 S.E.2d 334 (Ct.App. 1984), the Appellate Court affirmed the lower court's decision that the developer and its agent are liable for

misrepresentations made by salesman during negotiation for sale of lots, regardless of their knowledge as to those representations and confirmed civil penalty under SCUPTA.

It is respectfully submitted that this Court undertakes a review of the facts presented in the Record and of the laws and render its own Decision on merit on Koola's SCUPTA claim.

V. THE TRIAL COURT ERRED IN DENYING TRADEMARK'S LIABILITY TO KOOLA FOR NEGLIGENCE AND BREACH OF CONTRACT/WARRANTY BASED ON LACK OF PRIVACY.

Negligence

Koola has alleged in his Complaint that Trademark and is liable to Koola for negligence. To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (i) A duty of care owed by the defendant; (ii) A breach of that duty by a negligent act or omission; (iii) A negligent act or omission resulted in damages to the plaintiff; and (iv) That damages proximately resulted from the breach of duty. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996).

Trademark argues that Koola did not explain Trademark's breach of duty to support his negligence claim. (Trademark, Initial Brief, pp. 8-9) In his Initial Brief, Koola detailed the breach of duty for which Carolina One is liable to him (Appellant, Initial Brief, pp. 24-26). The breach of duty attributed to Carolina One attaches to Trademark, since they are joint tortfeasors.

Trademark's Duty of Care arose when the developer/seller hired Trademark to convert the Apartments to Condominiums in full compliance with SCHPA and to provide the statutorily required Disclosure information, including HPA § 27-31-430-

mandated Disclosure report to buyers. (R. # 8, # 10). Trademark assumed the following specific duty of care to sell a Condominium to Koola: (i) Converted the Apartment into Condominium which appellant bought subsequently; this act established the first step of Trademark's duty of care to Koola. (ii) Negotiated listing agreement and priced appellant's unit at \$126,900. (iii) Effected a price change on April 17, 2003 to realize an average price of \$134,500 on appellant's unit as well as all other unsold units; and (iv) Received Tax Map Number for appellant's Unit. (R. # 12, # 13, # 14)).

Conversion of the Apartments into Condominiums by Trademark without full compliance with SCHPA and sale of the converted Condominiums by Trademark to public without providing the statutorily required Disclosure information, including HPA § 27-31-430-mandated Disclosure report to buyers, caused Trademark to breach its duty of care to buyers. When Trademark converted the Apartment to Condominium, which Koola bought subsequently, Trademark assumed a duty of care to Koola. Carolina One, which followed Trademark, completed marketing the rest of the Condominiums in violation of SCHPA and did not provide HPA § 27-31-430 mandated disclosure report to any Condominium buyers including Koola. Carolina One also owed Duty of Care to Koola independently of Trademark, because it had the same duty to provide the statutorily required and HPA § 27-31-430-mandated Disclosure report to Koola and other buyers. Carolina One perpetuated the tort initiated by Trademark in the sale of the converted Condominiums; thereby they are joint tortfeasors.

Trademark should have foreseen that if it breached its duty of care to buyers, the buyers would suffer certain damages whether they bought Condominiums from

Trademark or Carolina One. Trademark's negligent act or omission is a proximate cause of injury. If Trademark had insisted to developer/seller that he has a duty to provide the HPA § 27-31-430-mandated Disclosure report to buyers and informed the buyers that they have a right to receive the said Disclosure report, the injury would not have occurred. Carolina One did not provide statutorily required Disclosure information, including HPA § 27-31-430-mandated Disclosure report to Koola because Trademark sold nearly thirty (30) Condominiums in disregard for SCHPA. Trademark's negligent act is the proximate cause of injury. To determine tort liability, **the key inquiry is foreseeability, not privity**". *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770.

Breach of Contract/Express or Implied Warranty

For the same arguments that Trademark and Carolina One are liable to Koola for negligence, Trademark and Carolina One are liable to Koola for Breach of Contract/Express and Implied Warranty.

Trademark cites to *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct.App. 2009) and argues that there was no contract between Koola and Trademark. Trademark further cites to *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976) and argues that Trademark did not sell a Condominium to Koola and did not offer any warranties to Koola. *Branche Builders, Inc.* and *Lane* do not apply when the defendant is a joint tortfeasor. *Barker, supra*, and *Scott, supra*, cited and briefed earlier have held that a tortfeasor is liable to a third party with out any contractual relationship with the third party and eliminated any privity requirements as defense between a tortfeasor and a third party.

In *Terlinde v. Neeley, supra*, the Supreme Court reversed the lower court's ruling and ruled that the respondents (homebuilders) are liable to appellants (the subsequent purchaser of a home) for breach of implied warranty despite the absence of privity between the parties: "The fact that the subsequent purchaser did not know the homebuilder, as did the original purchaser, does not negate the reality of the "holding out" of the builder's expertise and reliance which occurs in market place. We recognized this concept in *Lane, supra*, by implying a warranty even though the buyer did not know the actual builder and consequently did not rely on his skill." *Id.*

Lack of Privity

Trademark is liable to Koola for negligence without the defense of Privity requirements: *Barker v. Sauls*, 289 S.C. 121, 345 S.E.2d 244 (1986). *Scott by McCure v. Fruehauf*, 302 S.C. 364, 396 S.E.2d 354. *Kennedy vs. Columbia Lumber and Manufacturing Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (1989) and *JKT Co. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980).

Trademark argues further that appellant's reliance on "Lack of Privity" arguments is misplaced and quotes from *Barker*: "The key inquiry is what duty, if any, is owed by the tort-feasor to the third party. It is essential to liability for negligence that parties have some relationship recognized by law to support the duty owed by the tort-feasor." Trademark makes a hollow and frivolous claim that appellant failed to recognize the crucial proposition of *Barker* by withholding crucial information from *Barker*, which recognized that "the duty [owed by the tort-feasor] may be derived from the tort-feasor's contractual relationship with another."

Because of the massive construction defects in Cambridge Lakes and the HOA's lawsuit, Koola could not sell his condominium when he tried to sell it *four times* during 2008-2010. Clearly, the condominium was not marketable. *Koola faces imminent foreclosure, which would result in the termination of ownership of his condominium resulting in huge damage to Koola. Trademark's actions were a proximate cause of harm that Koola suffered.* Koola lost everything that he had. At 71 years of age and no resources to live on except limited Social Security benefits, Trademark inflicted irreversible damages upon Koola.

Trademark cannot deny tort liability to Koola for negligence and breach of Breach of Contract/Express and/or Implied Warranty by claiming that it did not sell a Condominium directly to Koola.

It is respectfully submitted that this Court undertakes a review of the facts presented in the Record and of the laws and render its own Decision on merit on Koola's negligence claim.

VI. BECAUSE THE TRIAL COURT FAILED TO APPREHEND THE INTENTIONAL MISREPRESENTATION MADE BY TRADEMARK TO KOOLA, THE TRIAL COURT ERRED IN DENYING TRADEMARK'S LIABILITY TO KOOLA FOR FRAUD.

Koola has argued that Trademark is liable to Koola for Fraud. (R. # 5). Fraud is an intentional misrepresentation of truth for the purpose of inducing another in reliance upon it to part with some valuable belonging to her or to surrender a legal right. *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (2003).

Trademark repeats its hollow argument that it did not sell a converted Condominium to Koola and therefore did not make any representations about the Condominium to Koola..(Trademark, Initial Reply, pp. 10-11). In *Terlinde v. Neely*,

275 S.C. 395, 271 S.E.2d 768, the Supreme Court reversed the lower court's ruling and affirmed tort liability of a tortfeasor (home builders) to a third party (subsequent purchasers of home) despite the absence of privity between them by stating: "The key enquiry is foreseeability, not privity...." *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770.

The nine elements of fraud are (R. # 5):

(i) A **representation**: Conversion of the Apartments into Condominiums by Trademark without full compliance with SCHPA and sale of the converted Condominiums by Trademark to public without providing HPA § 27-31-430-mandated Disclosure report are the initial torts that Trademark committed. Carolina One, which followed Trademark, completed the marketing of the rest of the Condominiums in violation of SCHPA, because it also did not provide HPA § 27-31-430 mandated disclosure report to any Condominium buyers including Koola. Carolina One perpetuated the tort initiated by Trademark in the sale of the converted Condominiums, thereby their torts became a joint tort. To determine tort liability, "[t]he key inquiry is foreseeability, not privity". *Terlinde v. Neely, Id.* 275 S.C. 395, 399, 271 S.E.2d 768, 770.

Trademark had actual and constructive knowledge that it was marketing a converted condominium, that **failed to meet the legal requirements of SCHPA**, failed to comply with the mandate of HPA § 27-31-430, and failed to comply with the provisions of S.C. Code Ann. §§ 27-50-40(C),70(A) and S.C. Code Ann. §§ 40-50-137(A),(B)(2),(F)(K). The Master Deed (R. 9) made available to Koola [and all other Condominium buyers], clearly made the **fraudulent representation** that the conversion of the apartments into condominiums *complied* with SCHPA. Trademark

followed by Carolina One sold the condominiums to Koola and other condominium buyers as if they complied with the mandate of HPA § 27-31-430 and stating "**excellent price for quality product!**". (R. 19).

(ii) Its **falsity**: The *representation* that the conversion of the apartments into Condominiums *complied* with SCHA made by Trademark was absolutely **false**; for none of the Condominium buyers received a copy of the Disclosure report mandated by S.C. Code Ann. § 27-31-430;

(iii) Its **materiality**: The misrepresentations made by Trademark and Carolina One are **material**;

(iv) **Knowledge of the falsity or reckless disregard of its truth or falsity**: Both Trademark and Carolina One had **actual and constructive knowledge** of the truth that HPA § 27-31-430-mandated Disclosure report was not provided to Koola and any Condominium buyers. They sold the Condominiums to all the buyers as if S.C. Code Ann. § 27-31-430 has been complied with;

(v) **Intent that the representation be acted upon**: Trademark and Carolina One worked diligently so that the unwary condominium buyers would act on the representations made to them in the Master Deed;

(vi) The **hearer's ignorance of its falsity**: Koola was absolutely ignorant of the fact that the sale of Condominiums did not comply with the mandate of S.C. Code Ann. § 27-31-430 at the time he bought the condominium;

(vii) The **hearer's reliance upon its truth**: Koola absolutely believed and relied upon the representation made in the Master Deed and the Builder's Certification that the sale of Condominiums complied with S.C. Code Ann. § 27-31-430.

(viii) The **hearer's right to rely on**: The condominium buyers can interact only with the real estate agents and not with the seller. (R. # 8). Therefore, the hearer has **the right to rely on the representations** made by Trademark and Carolina One; and

(ix) The **hearer's consequent and proximate injury**: Because of the massive construction defects (R. # 20) in Cambridge Lakes and the HOA's lawsuit, Koola could not sell his condominium when he tried to sell it *four times* during 2008-2010. *Koola was forced to file Ch. 7 Bankruptcy and now faces imminent foreclosure, which would result in the termination of ownership of his condominium. The defendants' actions were a proximate cause of harm that Koola suffered. At 71 years of age and no resources to live on except limited Social Security benefits, Trademark and Carolina One inflicted serious damages upon Koola.*

The Court of Appeals affirmed that the salesman and his secretary, who sold a mobile home to a third person on behalf of the principal, were liable to the buyer for fraud for telling the buyers they could not rescind their contract to buy the mobile home, in misrepresenting the interest rate and due to negligence in administering an oath and attesting signatures. *Thomas v. Delta Enterprises, Inc.*, 302 S.C. 351, 396 S.E.2d 122 (Ct.App. 1990). Accordingly, Koola contends that he stated cognizable claims for fraud against Trademark and Carolina One. It was an error for the Trial Court to dismiss these claims on summary judgment and without a trial.

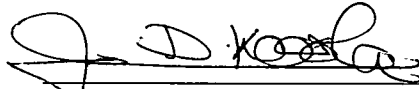
"Our legislature continues to place South Carolina in the vanguard of consumer protection". *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976). South Carolina Appellate Courts' policy of protecting the home buyers from latent defects is evident in *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*,

299 S.C. 335, 384 S.E.2d 730, 736. (1989) and *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770. The buyers of converted Condominiums face unprecedented difficulties because neither the developer/seller nor his real estate licensee/broker/agent **owns up** duty to provide/convey HPA § 27-31-430-mandated Disclosure report to condominium buyers when real estate licensee/broker/agent sells converted condominiums on behalf of the developer/seller. This Court's intervention is necessary to protect the Condominium buyers in South Carolina.

CONCLUSION

For the reasons stated, this Court should undertake *de novo* review of the Trial Court's decision on questions of law and on questions fact, if any, tried without a jury, and render a decision on the merits of the case.

Respectfully submitted,



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